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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEFFREY PIRO,

Plaintiff and Appellant,

v.

GARY K. PIRO, as Trustee, etc.,

Defendant and Respondent.

D053529

(Super. Ct. No.
37-2007-00100321-PR-TR-NC)

APPEAL from an order of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed.

Jeffrey Piro (Jeffrey), a beneficiary of a trust established by his mother (the Trust), petitioned under Probate Code¹ section 17200 for an order compelling the Trustee of the Trust, his brother Gary Piro (Gary), to distribute Jeffrey's share of the Trust assets in kind to Jeffrey and for other relief. In a supplemental petition, Jeffrey sought additional orders (1) removing Gary as Trustee, (2) requiring an accounting, and (3) for restitution of funds

¹ All further statutory references are to the Probate Code unless otherwise specified.

allegedly spent by Gary in violation of his obligations as Trustee. Gary's responses sought an order denying all relief sought by Jeffrey, and affirmatively sought orders permitting all of the Trust's interests in real property to be sold, authorizing payment of Trustee and attorney fees, and ordering an in-kind division of the only other significant Trust asset (the Del Mar Race Track Box). The court, after entering a February 29 order granting Gary's request for permission to sell the Trust's real property and approving Trustee fees to Gary and attorney fees to the attorneys for the Trust, scheduled a further hearing to resolve the remaining disputes between the parties. Shortly before the continued hearing date, Jeffrey filed another supplemental petition restating his request to remove Gary as Trustee and asserting (1) the Del Mar Race Track Box was not a Trust asset, (2) grounds existed to remove the Trust's attorneys, and (3) the judge should be disqualified because of bias.

After the continued hearing, the court denied Jeffrey's request to remove the Trustee and Trustee's attorney, found the Del Mar Race Track Box was a Trust asset, and awarded sanctions as requested by Gary. Jeffrey timely appealed the order.²

² Gary has moved for sanctions, alleging the appeal is frivolous. Although we affirm the judgment, we do not conclude that all of Jeffrey's arguments are so wholly baseless to constitute a totally frivolous appeal, and therefore we deny the motion for sanctions. However, we caution Jeffrey that litigation involving the Trust appears to have gotten out of control and further appellate proceedings will be subject to continued scrutiny with the probability of sanctions being awarded.

I

FACTUAL AND PROCEDURAL OVERVIEW

A. Factual Context³

The Trust

In 1996, Mildred Piro established the Trust. Her three sons (Jeffrey, Gary and Gerald) were equal beneficiaries, and Gary was designated the Trustee. Under the Trust instrument, the Trustee was granted the power to continue holding any property received in trust, the right to be compensated for performing as Trustee, the power to defend legal actions against the Trust and to employ legal counsel for the Trust, and to pay counsel from the Trust assets. The principal assets of the Trust were interests in four parcels of real property, three in Oceanside and one in North Hollywood, although Mildred's last will and testament also bequeathed the entire residue of her estate to the Trust.

Article IV.F.6 of the Trust provided the Trustee "shall distribute" to a beneficiary his interest in the trust when the beneficiary attains the age of 55 "subject to a possible retention of some or all of the assets of the trust estate by the Trustee pursuant to Article VI.S. . . ." The proviso set forth in Article VI.S. permitted the Trustee to "withhold from

³ Many of the relevant facts are undisputed. However, to the extent the facts are in dispute, we must accept the trial court's resolution of any factual disputes because Jeffrey has forfeited any claim that the trial court's resolution lacked substantial evidentiary support. (See fn. 9, *post.*) Additional facts will be discussed, to the extent they are relevant, in connection with our analysis of the discrete appellate claims asserted by Jeffrey.

distribution . . . all or any part of the property, so long as the Trustee shall determine, in the Trustee's discretion, that such property may be subject to conflicting claims"

The Evolution of the Disputes

After Mildred's death, the other owners of the fractional interests in the Oceanside properties found themselves mired in disputes with Jeffrey over the properties, including how to manage the properties and how to value the Trust estate for purposes of distributing the respective shares to Jeffrey and the other Trust beneficiaries. Between 2004 and 2007, the parties discussed numerous proposals for dividing the Trust properties among the Trust beneficiaries, but were unable to agree on the appropriate valuations to be assigned to each property interest held by the Trust that would permit in-kind distributions to be made on an equalized basis.⁴

In the fall of 2007, Gary scheduled a mediation between the parties to reach a global resolution of the appropriate methods to value and accomplish equal distributions of the Trust assets. However, Jeffrey canceled the mediation and proposed, apparently for the first time, that he be given a one-third distribution in kind of each of the Trust assets. Gary discussed Jeffrey's proposal with both Gerald and the other fractional owners of the Oceanside properties, and all were opposed to an in-kind distribution to Jeffrey.

⁴ For example, one proposal involved Jeffrey receiving the North Hollywood house. However, because its valuation indicated that it was worth more than Jeffrey's one-third share of the Trust assets, Gary proposed that Jeffrey take the North Hollywood house on condition he make an equalization payment to Gary and Gerald. That proposal was not accepted by Jeffrey.

B. The Litigation

Jeffrey's initial petition sought an order compelling the Trustee to make an in-kind distribution to Jeffrey, to deny Gary any Trustee fees, and other relief. Jeffrey's supplemental petition also sought orders removing Gary as Trustee, for an accounting, and for restitution of funds allegedly used improperly by Gary including legal fees paid to counsel for the Trust. Gary opposed all relief sought by Jeffrey and affirmatively sought an order permitting Gary to sell the Trust's interests in the real estate and authorizing payment by the Trust of Trustee fees and attorney fees. Gary also alleged the Trust owned a "box at the Del Mar race track," and sought an order dividing the annual costs equally between Jeffrey and Gary and ordering that, during racing season, Jeffrey receive use of the box on three days (Tuesdays, Thursdays and Saturdays) and Gary receive use of the box on the other three days (Wednesdays, Fridays and Sundays).

The court's February 29, 2008, order granted Gary's request for an order permitting the Trustee to sell the Trust's real property, approved Trustee fees to Gary for services through December 29, 2007, in the amount of \$45,000, approved attorney fees to the attorneys for the Trust for services rendered through January 31, 2008, and set a hearing for May 23, 2008, at which it would render a final ruling on the remaining issues raised by the parties.⁵

⁵ Jeffrey appealed that order, and the appealable issues are examined in *Piro v. Piro* (Feb. 27, 2009, D052776 [nonpub. opn.] (the companion case) decided concurrently with the present appeal.

Four days before the continued hearing, Jeffrey filed another supplemental petition. He restated his request to remove Gary as Trustee asserting that, in addition to the grounds for removal originally asserted in his petition, additional grounds for removal had arisen because (despite the court's February 29 order permitting sale of the real property interests) Gary had not listed the properties for sale or obtained an appraisal on one of the properties, or provided the promised accounting. Jeffrey also asserted that, based on the evidence he submitted, the court should declare the Del Mar Race Track Box was not a Trust asset. Jeffrey also asserted the Trustee's attorney should be removed because he was creating unnecessary expenses for the Trust and had engaged in perjurious conduct. Finally, Jeffrey asserted the judge should recuse himself because of the appearance of bias or actual bias.

After the continued hearing, the court denied Jeffrey's request to remove the Trustee and Trustee's attorney, found the Del Mar Race Track Box was a Trust asset, and awarded sanctions as requested by Gary.⁶ Jeffrey timely appealed the order.

⁶ The court previously found, to the extent Jeffrey intended his supplemental filing to constitute a motion to recuse the judge under Code of Civil Procedure section 170.1, the motion failed to provide a legal basis for the request, although the court specified Jeffrey would not be barred from filing a statement of disqualification in compliance with Code of Civil Procedure section 170.3.

II

ANALYSIS

A. Issues on Appeal

Jeffrey appears to raise four appellate claims.⁷ He argues, through incorporation by reference to his argument raised in the companion case, the court's order refusing to remove Gary as Trustee was error.⁸ Jeffrey also argues the court erred by (1) refusing to remove the Trust's attorneys, (2) finding the Del Mar Race Track Box was a Trust asset, and (3) awarding sanctions.

B. Removal of Trustee

Jeffrey argues the court erred in denying his request to remove Gary as Trustee. In the proceedings below, Jeffrey alleged numerous grounds supported his request that Gary be removed, including Gary's (1) refusal to provide any accounting, (2) refusal to distribute Jeffrey's interest in the Trust, (3) action in withholding the monthly income

⁷ As part of Jeffrey's requested relief in both this appeal and in the companion case, he requests that we order all further proceedings be conducted by a new trial judge. To the extent this request is premised on Jeffrey's perception that the trial judge should have been disqualified because of bias, that claim was raised by Jeffrey below and rejected. The exclusive avenue for appellate review of whether the trial judge should have been disqualified is by writ petition. (*Daniel V. v. Superior Court* (2006) 139 Cal.App.4th 28, 39.) Jeffrey did not pursue writ review of the order denying disqualification, and we do not further consider this aspect of Jeffrey's appeal.

⁸ Jeffrey asserts the removal of the Trustee issue should properly be resolved as part of his appeal in the companion case. However, he alternatively argues this claim should be resolved in the present appeal if this court determines the issue was not ripe for adjudication in the companion case. We have concluded the issue was not an appealable ruling in the companion case, but is an appealable ruling in this case, and we therefore treat this issue as part of the present appeal.

distribution from Jeffrey, (4) unauthorized withdrawal of \$12,000 from the Trust and other alleged self-dealing,⁹ and (5) use of adverse pressure and threats to coerce Jeffrey into accepting an unfair distribution.

The court rejected Jeffrey's request to remove the Trustee, finding Gary had provided Jeffrey with financial information concerning the Trust, had not refused to distribute Jeffrey's interest, and Gary's withdrawal of \$12,000 was not an unauthorized distribution but was instead partial payment of the Trustee fees to which Gary was entitled. Jeffrey argues Gary's alleged misfeasance supported his removal as Trustee, and therefore the trial court abused its discretion by rejecting Jeffrey's request to remove Gary as Trustee.

"When the settlor of a trust has named a trustee, fully aware of possible conflicts inherent in his appointment, only rarely will the court remove that trustee, and it will never remove him for potential conflict of interest but only for demonstrated abuse of power detrimental to the trust. [Citations.] In *Estate of Brown* [(1937) 22 Cal.App.2d 480, 486], the court said that the settlor's named trustee will be removed only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust. . . . [Where] [n]o actual dishonesty or obvious abuse exists [and] the conflict consists of relationships known to the settlor and expressly sanctioned by her[,]

⁹ Jeffrey alleged that Gary used Trust assets to improve an apartment owned by the Trust so that it could be rented by Gary's son and niece, without either reimbursing the Trust or compensating Jeffrey.

[t]he trial court acted correctly in refusing to remove the trustees." (*Estate of Gilliland* (1977) 73 Cal.App.3d 515, 528.)

Even if Jeffrey has not forfeited his claim that there was insufficient evidence to support the trial court's findings that Gary did not engage in actual dishonesty or in an obvious abuse of his fiduciary obligations,¹⁰ the record contains substantial evidence supporting the trial court's findings. Jeffrey argues, for example, that Gary refused to provide any accountings to Jeffrey, which breached the Trustee's obligations and justified removal of Gary as Trustee under section 15642, subdivision (b)(1). However, Gary's evidence showed Jeffrey had never requested a formal accounting and instead had been content to receive (and had been given) the bank account information and other accounting documents (including the income tax returns for the Trust) for many years, which satisfied the obligations imposed under Article VIII of the Trust. Accordingly, there was substantial evidence to support the trial court's conclusion that Gary had not committed a breach of the Trust by refusing to provide accounting information to Jeffrey.

Substantial evidence also supports the trial court's findings that Gary did not engage in an obvious abuse of his fiduciary obligations by refusing to distribute Jeffrey's full one-third interest in the Trust. Instead, the declarations submitted by Gary and Gerald, and the numerous copies of e-mails provided to the court, showed that for several

¹⁰ Jeffrey's opening brief ignores the evidence presented by Gary, and instead recites only the evidence he submitted at trial to support his claims of dishonesty or abuse of the Trustee's powers, which would permit us to peremptorily reject his claim that no substantial evidence supported the trial court's finding. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.)

years the parties had discussed numerous proposals for dividing the Trust assets (including forming a limited liability partnership or taking in-kind distributions with equalizing transfers) but had been unable to reach an accord on how to value the assets or what would constitute a fair division of the Trust estate. Because this evidence showed the parties could not agree on what would constitute a fair division, and we have concluded (in the companion appeal) Gary was not obligated to accede to Jeffrey's demand for an in-kind distribution of the property, there was substantial evidence to support the trial court's conclusion that Gary did not violate any fiduciary obligation by not distributing Jeffrey's share of the Trust.

Jeffrey also asserted Gary breached his fiduciary obligations by making an unauthorized withdrawal of \$12,000 from the Trust and by other alleged self-dealing, and these actions warranted removal of Gary as Trustee. However, the trial court ruled (and in the companion appeal we have affirmed) Gary was entitled to be compensated for acting as Trustee, and the \$12,000 represented partial payment of those fees. Jeffrey cites nothing to suggest that a Trustee's receipt from the Trust of his authorized compensation violates a fiduciary obligation warranting removal.¹¹

¹¹ Jeffrey also asserted Gary engaged in self-dealing because Gary spent Trust funds to improve one of the properties in which the Trust had an interest. However, because this expenditure benefited Trust property, it redounded equally to the benefit of all beneficiaries. Moreover, although Jeffrey claimed renting the property to Gary's son and niece constituted self-dealing, Jeffrey admitted the fair rental value was \$1200 per month and he received \$400 per month (his one-third share of the Trust's income) from that rental. Jeffrey articulates no explanation of how that arrangement violated Gary's fiduciary obligations to him.

We conclude substantial evidence supports the findings Gary did not commit the misfeasance Jeffrey alleged as grounds for removing Gary as Trustee.

C. Removal of Trust Attorney

Jeffrey sought an order removing the attorneys for the Trust, asserting the attorneys charged excessive or unnecessary legal fees because of their incompetence, and had engaged in unethical and perjurious conduct in these proceedings. The court denied Jeffrey's request, and he claims this was error.

Preliminarily, Jeffrey cites nothing to suggest that a trust beneficiary may petition under section 17200 to remove the attorney for the trust. Although section 17200 contains 21 itemizations of the types of relief that may be sought by a beneficiary's petition, removal of the trust attorney is not included within its provisions. Jeffrey's sole legal basis for this requested order is section 17206, which provides the court discretion to "make any orders . . . necessary or proper to dispose of the matters presented by the petition." However, we construe that section as referring to "matters [*properly*] presented by the petition," rather than all claims asserted by a petitioner *regardless* of whether the claims fall within the statutorily prescribed purview of section 17200.

Moreover, even assuming Jeffrey had standing to seek this relief (but see *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 282-286 [attorney retained by a trustee of a trust has as his client the trustee-fiduciary of the trust rather than the beneficiaries of the trust]), the court rejected the factual basis for Jeffrey's claims. Jeffrey's principal argument was the attorneys charged excessive fees (based on the work performed) or unnecessary legal fees (because competent counsel could have obviated

much of the litigation through informal contacts with Jeffrey). However, the court's rejection of this claim noted it had previously approved the requested fees as fair and reasonable, which necessarily constituted an implied rejection of Jeffrey's factual claim that the fees were either excessive or unnecessary. Because we upheld the ruling regarding attorney fees in the companion appeal as supported by the evidence (see *Piro v. Piro, supra*, section II.D.), we necessarily conclude the trial court had substantial evidence upon which to reject Jeffrey's claim of excessive or unnecessary fees.

Jeffrey also asserted the Trust's attorneys engaged in perjurious conduct. He specifically alleged that a declaration filed by the Trustee contained a false assertion (e.g. that Gary had sent e-mails to Jeffrey after October 31 seeking a negotiated resolution of the disputes) and a declaration by the Trust's attorneys contained a false assertion (e.g. that the court had "warned Appellant" about his numerous filings"). However, there was substantial evidence from which the court could have concluded those statements were not perjurious,¹² and therefore the court's rejection of this alleged basis for removal is supported by substantial evidence.

¹² For example, Gary's statement that he sent e-mails after October 31 soliciting proposals for a negotiated resolution was verified by another declaration filed with the court. The statement that the court "warned Appellant" about his numerous filings" is an apparent reference to the reported proceedings of February 22, 2008, (of which we take judicial notice pursuant to Gary's Request for Judicial Notice) in which the court told Jeffrey (at several points in the proceeding) that repeated appearances before the court would merely result in increasing the fees charged to the Trust.

D. The Del Mar Race Track Box

Jeffrey asserts the evidence was insufficient to support the finding that the license to use the Del Mar Race Track Box belonged to the Trust. The evidence was undisputed that a nontransferable license to acquire seats for the racing season at the Del Mar Race Track had been in the family for many years. Gary contended the license was a Trust asset, and Jeffrey claimed the license was his because it had been transferred from Mildred to him. Gary, relying on the "pour-over" provisions of Mildred's will, argued the license was a personal property asset bequeathed to the Trust on her death because there were no written instructions transferring the license to Jeffrey. The court ruled the license was an asset of the Trust.¹³

Jeffrey asserts there is no evidence to support this finding. However, it is undisputed that Mildred's will contained a pour-over provision bequeathing all of her personal property to the Trust "[e]xcept as provided in any written instructions to my Executor regarding the disposition" of personalty. Accordingly, as long as there is some evidence the license was Mildred's property, the court had evidence that it became an asset of the Trust. There was such evidence here because Jeffrey's affirmative allegation--that the license "was given to [Jeffrey] by [Mildred]"--contained an implied

¹³ The court also noted the parties had reached an agreement on an in-kind division of the tickets the license entitled the Trust to acquire, but were unable to agree on who would hold and distribute the tickets. Accordingly, the court ordered that a third party (Mr. Messina, the accountant for the Trust) would receive the yearly invoice for the cost of the tickets, would forward that invoice to each of the beneficiaries (with each brother being responsible for paying one-third of the yearly cost), and would hold and distribute the tickets in accordance with the agreed-on division.

admission that Mildred owned the license. Accordingly, the court had substantial evidence from which to conclude the license was an asset of the Trust.

E. The Sanctions

The trial court found Jeffrey's attempt to remove Gary as Trustee was in bad faith and contrary to the settlor's intent, and therefore ordered Jeffrey to pay costs of \$3,597 under section 15642, subdivision (d).¹⁴ Jeffrey argues this award was erroneous.

We review an order in the nature of statutory sanctions under the deferential abuse of discretion standard. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1168.) Section 15642 grants a court the discretion to award costs if it finds two predicate facts: the petition seeking removal was brought in bad faith and removal would be contrary to the settlor's intent. There is substantial evidence that removing Gary as Trustee would be contrary to Mildred's intent, because the Trust specifically declared Gary should serve as Trustee until his death, incapacity or resignation prevented him from serving as Trustee.

The only significant dispute is whether the court had substantial evidence from which to conclude the attempted removal was in "bad faith." On appeal, our function is "limited to determining if there is any substantial evidence to support the trial court's order [and] [w]e may not reweigh the evidence or substitute our discretion for that of the trial judge." (*Estate of Ivey* (1994) 22 Cal.App.4th 873, 881.) In this case, the court

¹⁴ Section 15642, subdivision (d), provides that "[i]f the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees."

found the alleged grounds for removal (Jeffrey's allegations that Gary refused for 19 months to distribute Jeffrey's interest, Gary could have offered to sell the assets and cash Jeffrey out prior to Jeffrey's filing his petition, Gary insisted on valuing one asset at an obviously low amount, Gary had made a secret deal with Gerald to share the Trustee fees among themselves to Jeffrey's detriment, and Gary had taken \$12,000 from the Trust without authority) were false and devoid of merit. There is substantial evidence supporting this conclusion. First, although Gary and Jeffrey were unable to reach a negotiated agreement on how to divide the Trust assets, the evidence permitted the conclusion Gary was consistently trying to find an acceptable way to distribute Jeffrey's share rather than refusing for 19 months to distribute Jeffrey's share. Second, Jeffrey's claim that Gary insisted on valuing one asset at an obviously low amount was contradicted by substantial evidence that, when Jeffrey claimed the appraisal was too low, Gary authorized an appraiser *selected by Jeffrey* to perform an updated appraisal and, when Jeffrey unilaterally canceled *that* appraisal, Gary offered to hire an independent MAI appraiser and Jeffrey ignored that offer and instead declared he would reject all appraisals and would rely on his own opinion as to the value of the property. Third, although Jeffrey claimed there was a secret deal between Gary and Gerald to divide the Trustee fees, both Gary and Gerald denied that allegation and Jeffrey did not submit a scintilla of evidentiary support for that allegation. Finally, Jeffrey reasserted his argument that Gary should be removed because he had taken \$12,000 in Trust funds without authority despite (and in the face of) the court's earlier explicit granting of Gary's request for approval of Trustee fees.

A trial court can infer bad faith from evidence that the party tendered false allegations utterly devoid of merit (*Monex International, Ltd. v. Peinado* (1990) 224 Cal.App.3d 1619, 1625-1626), and the inference draws added weight when there is evidence the party tendering such claims bears animosity toward the opponent (*Estate of Ivey, supra*, 22 Cal.App.4th at p. 882), as is present here. On this record, we cannot conclude the award of \$3,597 in attorney fees, incurred to respond to the false claims, was an abuse of discretion.

DISPOSITION

The order is affirmed. Gary is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.